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In The
Supreme Court of the United States
October Term, 1963

No. [illegible] 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE RESPONDENTS

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No. 368

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Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether Congress, in enacting the Taft-Hartley Act and Section 14(b) thereof, intended to deprive right-to-work states of the authority to prohibit the execution and application of the Agency Shop compulsory unionism agreement?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 12 of the Declaration of Rights of the Florida Constitution (§12, 25 Fla. Stat. Ann.) provides as follows:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Section 14(b) of the National Labor Relations Act (61 Stat. 151, 29 U.S.C. §164) provides as follows:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

STATEMENT OF THE CASE

The statement of facts set forth in the petitioner's brief is misleading and does not accurately present the true picture. In addition to numerous excursions into matters completely outside the Record, petitioner in its Statement of the Case, and throughout its brief, attempts to give the false impression that the agreement which gave rise to this litigation is not an "Agency Shop Agreement", but simply an arrangement whereby non-union employees are required to pay "service fees" for specific services rendered to them, and that such "service fees differ in purpose, use and amount from the dues and fees paid by the members of the union." (Petitioner's brief, pp. 31, 32, 57).

The brief filed by the AFL-CIO and the United Auto Workers as Amici Curiae similarly misrepresents that the fees required in the present case are for specific services rendered, and that these fees are different in character from the "Agency Shop" fees involved in the *General Motors case*, No. 404, now pending before this Court.

The inaccuracy of such representations may be seen from the actual Record which shows the following facts:

The collective bargaining agreement entered into on October 4, 1960, between petitioner, Retail Clerks Union, and Food Fair, Inc., contains a clause entitled "Agency Shop Clause" (R. 9), reading as follows:

"AGENCY SHOP CLAUSE"

"Employees shall have the right to voluntarily

join or refrain from joining the union. Employees who choose not to join the union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the union for the purpose of aiding the union in defraying the costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the union. Other than the payment of these service fees, those employees who do not choose to join the union shall be under no further financial obligations or requirements of any kind to the union. It shall also be a condition of employment that all employees covered by this Agreement shall on the thirtieth day following the beginning of such employment or the effective date of this Agreement, whichever is later, pay established initial and monthly service fees as shown above." (R. 13).

Following the execution of the aforesaid agreement, the Company and the union jointly posted a notice addressed to all employees bearing the heading, "IMPORTANT NOTICE TO EMPLOYEES (AGENCY SHOP PROVISION)". The "important" notice recited that a new collective bargaining contract had been entered into and that "Article 19 of the Agreement provides for the

establishment of an Agency Shop", and that a "few words of explanation may be in order". The notice went on to state,

> "Even though you may not have joined the union, you are obligated under the provisions of the Agency Shop, to pay an "initial service fee which is the **equal** of the initiation fee for union members and a monthly service fee which is the **equal** of the monthly dues for those who voluntarily became union members." (R. 7). (Emphasis added).

Respondents, four non-union employees of Food Fair, Inc., filed a complaint in equity in the Circuit Court of Dade County, Florida, seeking a declaratory judgment that the "Agency Shop" clause violated the "Right-to-Work" guarantee of the Declaration of Rights of the Florida Constitution, Section 12, and requested an injunction to restrain the union and Food Fair from enforcing the provisions of the Agency Shop clause. Attached to the complaint were two exhibits, the Agency Shop clause of the contract, and the "important" notice to employees set forth above.[1]

A motion to dismiss the complaint was filed by all of the defendants on two grounds; first, that the matter

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[1]Petitioner's brief describing the proceedings in the trial court erroneously keeps referring to the plaintiff-respondents complaining of a "service fee" arrangement (pp. 5, 6). The fact is that the respondents' complaint referred solely to the "Agency Shop" provision using the same term used by the union in the Agreement and in the notice affixed to the complaint as Exhibit "A". Also, the Record further shows that petitioner in its Response to application for temporary injunction, referred solely to the Agency Shop in four places, and never used the term "service fee". (R-11, 12).

was one within the exclusive jurisdiction of the National Labor Relations Board, and second, that the complaint did not state a cause of action in that the Agency Shop provision did not violate the Right-to-Work provision of the Florida Constitution. (R. 9)

The trial court granted the motion to dismiss, stating:

> "The Complaint . . . is hereby dismissed for the reason that the court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant union and defendant Food Fair, is not violative of the Florida "Right-to-Work" law as contained in Section 12 of the Declaration of Rights of the Constitution of Florida."[2] (R. 15)

The cause was appealed by the plaintiffs, respondents herein, to the District Court of Appeal, Third District. The District Court of Appeal heard arguments and filed an opinion in which the "Final Judgment" of the trial court was reversed and the cause remanded. Before that decision became final, the appellees (petitioner herein) filed a motion to the court to withdraw its opinion and transfer the appeal to the Florida Supreme Court, asserting that the appeal should have been made directly to the Supreme Court, because the decision was "one construing a controlling provision of the Florida Constitution". The District Court granted the motion and transferred the

[2]Under established Florida Rule of Civil Procedure 1.8, (similar to Federal Rule 12(b), "when a motion to dismiss is denied, movant is then required to file an answer incorporating any and all defenses and the cause then arrives at issue". The Record before this Court and the Florida Appellate Court does not contain an Answer by the petitioner.

cause to the Supreme Court, and entered an order withdrawing its opinion, conditioned upon the Supreme Court accepting jurisdiction. The Supreme Court determined that it had the requisite appellate jurisdiction.

After oral argument and due deliberation, the Supreme Court held that the Agency Shop contract provision violated the state's Right-to-Work constitutional safeguard, adopted in **haec verba** the vacated decision of the District Court, and remanded the cause back to the trial court for further proceedings not inconsistent with their opinion. (R. 24-34). After petitioner notified the Florida Supreme Court of its intention to petition this Court for a writ of certiorari, the Florida Supreme Court stayed the issuance of its mandate to the trial court.[3]

In the proceedings before the Florida Supreme Court, as in the prior proceedings, the union raised the issue of exclusive federal jurisdiction. The Supreme Court rejected this contention on the ground that section 14(b) of the Taft Hartley Act preserves the jurisdiction of the states in matters involving state "right-to-work" provisions, and stated:

"It is true that section 14(b) specifically deals

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[3]The petitioner has ingeniously, by means of a voluminous footnote on pages 8 and 9 of its brief, sought to create facts that are not part of the Record and are grossly in error. Confining review of this case strictly to the Record as contemplated by the Rules, we must state that the petitioner's fictitious facts are grossly inaccurate, unsupported by any record, and that the footnote references to matters dehors the Record should be disregarded by this Court.

It should also be noted that petitioner's brief throughout constantly alludes to matters not found in or supported by the Record. (See p. 9 of petitioner's brief wherein petitioner states that the "bulk of the missing parts of the Record proved . . .").

only with "agreements requiring **membership** in a labor organization as a condition of employment . . ." However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states." (R. 24).

The correctness of this ruling of the Supreme Court of Florida on the federal pre-emption question, insofar as it relates to the Agency Shop, is the sole question presented herein. Petitioner's brief erroneously states the question as relating to an alleged "service fee clause" rather than an Agency Shop. The petitioner's questions in its brief bearing the date of January 30, 1963, were not presented to the Florida courts, and are not the same as the questions presented to this Court in the petition for writ of certiorari submitted August 24, 1962.

SUMMARY OF ARGUMENT

Congress intended, in section 14(b) of the Taft-Hartley Act, to preserve the jurisdiction of the states in matters involving union security agreements. An interpretation of section 14(b) that would permit the agency shop form of agreement to circumvent and, in effect, nullify what section 14(b) seeks to preserve, would render that section meaningless.

Although section 14(b) refers to "agreements requiring **membership** in a labor organization", the phrase is

used as a generic term covering all forms of union security agreements. This is clearly shown by the legislative history of the Taft-Hartley Act, wherein Congress unequivocally indicated that section 14(b) was included "to assure nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, **or other form of compulsory unionism agreement.**"

Section 14(b) would be bereft of meaning if it were construed as leaving to the states only the regulation of agreements requiring **membership** in a literal sense, because the enforcement of a **membership** requirement is prohibited by the federal Act itself. Under the narrow interpretation thus suggested by petitioner, section 14(b) would leave to the states only the authority to go through the useless motions of prohibiting that which is already unlawful under federal law. The Solicitor General of the United States and the National Labor Relations Board recognize this fact, and have relied upon it in their argument before this Court in the *General Motors* case.

The exclusive jurisdiction rule adopted in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and other pre-emption cases, does not affect the right of the states to regulate Agency Shop agreements. Such agreements are not, even arguably, a protected activity under the National Labor Relations Act. On the contrary, if such agreements are permitted at all, they are permitted only as an exception to the basic right guaranteed employees "to form, join or assist labor organizations", or "to refrain from any or all such activities". The National Labor Relations Act merely "disclaims a national policy hostile to union security agreements"—it does not **protect** them.

The Agency Shop agreement here involved is no different, in substance, from that involved in the *General Motors* case, notwithstanding petitioner's fictionalized description to the contrary. The essential element in each case is the requirement that non-union employees pay to the union the equivalent of the union initiation fees and monthly dues. Accordingly, if, as held by the Sixth Circuit Court of Appeals in *General Motors*, the Agency Shop form of agreement is unlawful under the federal Act, the question of whether the states can prohibit such agreements is purely academic. If, on the other hand, Agency Shop agreements are permissible under the federal law, they are permissible only if not prohibited under state law.

Petitioner's contention that the parallel references to agreements requiring "membership as a condition of employment", in section 8(a)(3) and section 14(b) are to be construed in the one case as including Agency Shop agreements, but in the other, as not including such agreements, is a completely contrived effort to ascribe different meanings to the same words—semantic legerdemain—and nothing more. If these parallel phrases were intended to have different meanings, Congress most certainly would have clearly manifested such intention.

Petitioner's substitution of the term "Service Fee" as a new name for the Agency Shop payments required under the Agency Shop Clause of the contract here involved does not change the nature, purpose and effect of these payments. This substitution of names merely raises a false and fictitious issue.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF SECTION 14(b) OF THE TAFT-HARTLEY ACT CONCLUSIVELY SHOWS THAT CONGRESS INTENDED TO LEAVE UNION SECURITY AGREEMENTS OF ALL TYPES FOR REGULATION BY THE STATES.

The term "Agency Shop" is of recent origin, having come into use only within the past ten years. At the time the Taft-Hartley Act was enacted in 1947, the term was unknown, and for this reason, there is no reference to it anywhere in the reports and debates leading to passage of the Act. The three forms of union security agreements in use at that time were the closed shop, the union shop; and maintenance of membership, all of which called for membership in the union.

Florida, the first state to enact a right-to-work law, adopted its constitutional amendment in 1944. Several other states immediately followed suit, and prior to passage of the Taft-Hartley Act, at least six of these right-to-work states expressly prohibited any requirement **for payment of dues, fees or charges of any kind** to a labor union as a condition of employment.[4]

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[4]The Virginia right-to-work law, section 40-72, Virginia Code, provided: "No employer shall require any person, as a condition of employment or continuation of employment to *pay any dues, fees or other charges* of any kind to any labor union or labor organization." North Carolina's Statute (section 95-82) contained identical wording.

The Georgia right-to-work law (Georgia Code, section 54-903) stated: "No individual shall be required as a condition of employment

Congress was aware of the broad language of these state laws, and clearly indicated that the purpose of section 14(b) was to assure that nothing in the Taft-Hartley Act would interfere with the application and enforcement of such state restrictions. For example, Senator Taft, sponsor of the legislation in the Senate, and a member of the Senate-House Conference which approved the final version, explained the purpose of section 14(b) as follows:

> "Many states have enacted laws or adopted constitutional provisions to make **all forms** of compulsory unionism in such states illegal. As stated in the report accompanying the Senate Committee bill, it was not the intent to deprive the states of that power . . . " (Cong. Rec. Senate, June 6, 1947, p. 6675). (Emphasis added).

House Report No. 245, reporting on the House version, H.R. 3020, made reference to the right-to-work laws of twelve states, including those which restricted agree-

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or continuance of employment, to *pay any fee, assessment or other sum of money whatsoever* to a labor organization."

The Tennessee Code (section 50-210) provided: "It shall be unlawful for any person, firm, corporation or association of any kind to exclude from employment any person by reason of such person's payment of or failure *to pay dues, fees, assessments, or other charges* to any labor union or employee organization of any kind".

The Iowa Code (section 736 A.4) stated: "It shall be unlawful for any person, firm, association, labor organization or corporation or political subdivision, either directly or indirectly, or in any manner or by any means as a prerequisite to or condition of employment to require any person *to pay dues, charges, fees, contributions, fines or assessments* to any labor union, labor association or labor organization."

The Arkansas Constitution (Amendment 34) provided that no person shall be denied employment because of membership or non-membership in a labor union, "nor shall any person against his will *be compelled to pay dues* to any labor organization as a prerequisite to or condition of employment." (Emphasis added throughout.)

ments requiring **payment of any dues, fees, or other charges,** and went on to state that section 14(b) declares the subject of compulsory unionism one that the states may regulate concurrently with the United States **"notwithstanding that the state laws limit compulsory unionism far more drastically than does federal law."** (House Report No. 245, 80th Cong.) (Emphasis added).

The report of the managers on the part of the House stated with reference to section 13 of the House bill (H.R. 3020) and section 14 of the Conference Committee amendments:

> "Under the House bill there was included a new Section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or **other form of compulsory unionism agreement** in any state where the execution of such agreement would be contrary to state law. **Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those states illegal.** It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that Act, to preempt the fields in this regard so as to deprive the states of their powers to prevent compulsory unionism . . . To make certain that there should be no question about this, Section 13 was included in the House bill. The Conference Agreement, in Section 14(b), contains a provision having the same effect." (93 Cong. Rec. June 4, 1947, p. 6378). (Emphasis added).

House Conference Report No. 510, 80th Congress, stated:

> "Under the House bill there was included a new Section 14(b) of the National Labor Relations Act to assure nothing in the Act was to be construed as authorizing any closed shop, maintenance of membership, **or other form of compulsory unionism agreement** in any state where the execution of such agreements would be contrary to state law."

In spite of these extremely clear and conclusive expressions of Congressional intent, petitioner, in its brief, attempts to convey a completely different impression of the legislative history. In so doing, it disregards the above-cited statements of the sponsors of the legislation and the Committee Reports, and quotes, instead, fragmentary comments by opponents of the legislation, such as Senator Morse and Senator Pepper. Such a method of establishing the intent and meaning of the statutory words is hardly in accord with accepted principles of statutory construction.[5]

If any reinforcement of the intent of Congress to leave Agency Shop agreements for state regulation were needed, it may be found in the legislative history of the

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[5]Petitioner makes reference to a comment by Senator Taft in a Senate debate to the effect that the bill reported by the Conference Committee " would not invalidate the provisions of a state law prohibiting the closed shop." Petitioner argues, apparently, that this shows an intent to limit state authority only to prohibiting the closed shop. This is so completely out of context with the purpose of section 14(b) as explained elsewhere by Senator Taft, and in Committee Reports, it is difficult to understand why petitioner has made reference to it. (Petitioner's brief, p. 43).

Landrum-Griffin Act amendments to the Taft-Hartley Act adopted by Congress in 1959, Public Law 257, 86th Cong. 73 Stat. 519. Among other sections of the Taft-Hartley Act affected by these amendments, was section 302 which makes it unlawful for an employer to pay any money or other thing of value to any representative of a labor organization representing his employees, except for certain designated specific purposes, one of which is "money deducted from the wages of employees in payment of membership dues in a labor organization . . . ." Union supported efforts to amend this section to authorize payment of Agency Shop fees, as well as membership dues, were made in both the Senate and the House, but were unsuccessful.

The Kennedy-Ervin bill, S-1555, passed by the Senate on April 25, 1959, contained an amendment to section 302(c)(4) which would make that section read; "Money deducted from the wages of employees in payment of membership dues in **or other periodic payments to a labor organization in lieu thereof.**" (See Legislative History of the Labor Management Reporting and Disclosure Act of 1959, 52.) Senator Goldwater criticized this amendment, both in the Senate and in an appearance before the House Committee on Education and Labor, at which time he informed that Committee:

> "In another section the (Senate) bill would tighten the hold of compulsory unionism on the Nation by recognizing as legitimate a practice which has come to be known as the agency shop . . . This practice is being utilized increasingly in right-to-work states to achieve the equivalent of the type of union-security arrangement which

is permitted under the Taft-Hartley Act but which it was the intention of Congress in that statute to authorize the states to prohibit if they so wished." (Hearings, Joint Sub-Committee of the House Committee on Education and Labor, 86th Cong. 1st Sess., on H.R. 3540, H.R. 3302, H.R. 4473, H.R. 4474 and related bills regarding labor-management reform legislation, part 4, at page 1628 (1959)).

Following Senator Goldwater's appearance, the House Committee struck out the proposed Senate amendment to section 302(c)(4), and the House bill, H.R. 8342, passed the House without this amendment. An effort to restore the proposed amendment was defeated on the House floor. (Cong. Rec. August 14, 1959, p. 14538) (Legislative History, 1699). The Conference Committee adopted the House version, and the bill as finally passed did not contain this controversial amendment to section 302. Thus, Congress rejected this amendment which would, as Senator Goldwater pointed out, give tacit approval to Agency Shop agreements in states which had adopted laws prohibiting all forms of compulsory unionism. Such a rejection is valid evidence that Congress regards the Agency Shop as a matter subject to regulation by the states and desires to make no change in this respect. Resort to subsequent legislative action of this type may properly be utilized as an aid in determining the legislative intent of the original Act. See *Madden v. Transit Employees Union*, 147 F. 2d 439 CA 4 (1945).

In the case of *Amalgamated Association Motor Coach Employees v. Las Vegas-Reno-Tonopah Stage Lines*, DC Nev., 202 F. Supp. 726 (1962), the District Court had

before it the question of whether an Agency Shop agreement was permitted under the Nevada Right-to-Work law, and whether the state could, under section 14(b) of the Taft-Hartley Act, prohibit such an agreement. After reviewing the legislative history of section 14(b), and the attempted amendment of section 302, referred to above, the Court held:

> "We are convinced that under the Taft-Hartley Act, there is no meaningful distinction between the type of union security which is provided for in the proviso to section 8(a)(3) and the union security which is provided for in the Agency Shop contract at bar. Any distinction which does exist is purely a matter of form. . .
>
> Although it is true that section 14(b) literally only gives the states the right to outlaw agreements which make 'membership' in a union compulsory, we are convinced that we would be frustrating the clear congressional purpose and creating an utterly absurd result if we were to hold that literalness should be exalted to a point where the states were denied the right to ban the Agency Shop as well. Section 14(b) would be bereft of meaning if we were to construe it in a fashion which would render the states powerless to make illegal that type of union security which imposes liabilities on the working man which, realistically, are the same liabilities which, under the section, the states may remove."

A similar construction of the intent and meaning

of section 14(b) as shown by the legislative history, was reached by the Supreme Court of Kansas in holding that Agency Shop agreements are invalid under the Kansas Right-to-Work Law. *Higgins v. Cardinal Manufacturing Co.*, 188 Kan. 11 (1961), 360 P 2d 456, cert. den. 368 U.S. 829 (1962). See also *Sheet Metal Workers v. Nichols*, 89 Ariz. 187, 316 P. 2d 204 (1961).

II.

SECTION 14(b) WOULD BE BEREFT OF MEANING AND PURPOSE IF UNDER IT THE STATES HAVE ONLY THE AUTHORITY TO PROHIBIT AGREEMENTS REQUIRING MEMBERSHIP IN A LITERAL SENSE.

Petitioner's contention that section 14(b) of the Taft-Hartley Act permits the states to regulate agreements requiring labor union "membership" and nothing more, would leave the states without any meaningful authority in regard to regulation of compulsory unionism, for the reason that the National Labor Relations Act itself prohibits the enforcement of any requirement of "membership" as a condition of employment.

The authorization for union security agreements contained in section 8(a)(3) of the Act, reads as follows:

> "Section 8.(a) It shall be an unfair labor practice for an employer . . .
>
> * * *
>
> (3) by discrimination in regard to hire or

tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Provided, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . ."

This language of section 8(a)(3) is followed immediately by the proviso that an employer may not discharge an employee for any reason "other than the failure of the employee to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Under this proviso, an employee can refuse to join or to remain a member of the union, but so long as he tenders the required amount of dues and fees exacted by the union, he cannot be discharged.

It has been repeatedly held by the courts and by the National Labor Relations Board that an agreement requiring "membership" in a strict sense, or one under which an employee could be discharged for "non-membership", is prohibited under section 8(a)(3). The only requirement permitted under section 8(a)(3) is the payment of money. In *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954), this Court stated that section 8(a)(3) clearly indicates:

". . . that Congress intended to prevent the utilization of union security agreements for any pur-

pose other than to compel payment of dues and fees."

Numerous other cases construing section 8(a)(3) have held that the only compulsion permitted under this section is the payment of money, and that a requirement for "membership" cannot be enforced. *Union Starch & Refining Co., v. NLRB*, 186 F. 2d 1008, CA 7 (1951); *NLRB v. Philadelphia Iron Works*, 211 F. 2d 937 CA 3 (1953).

Petitioner contends, however, that section 8(a)(3) requires something more than simply the payment of dues and fees; tht it in fact requires a willingness on the part of an employee to join the union. The tender of union dues, petitioner contends, is only a manifestation of the employee's willingness to be a member of the union. In support of this argument, petitioner points out that in the *Union Starch* case, supra, the National Labor Relations Board concluded that the employees who had refused to sign union membership applications, take the oath required of union members, or attend the union meetings were, nevertheless, "willing" to join the union but were simply unwilling to comply with these other conditions of membership.

It must be said that this is a rather strange use of the word "willing", and one that is not supported by any authoritative court decisions. In numerous cases involving section 8(a)(3), it has been held that employees who have flatly refused to join, or who have unequivocally resigned from the union, need only tender the union dues to protect their jobs. *NLRB v. Pape Broadcasting Co.*, 217 F. 2d 197 CA 5 (1954); *NLRB v. International Association of Machinists*, 203 F. 2d 173 CA 9 (1953). This

latter case involved the legality of the discharge of an employee whose antipathy toward the union was carried to the extent of starting a campaign to oust the union as bargaining agent. Although he tendered the required amount of union dues, the union obtained his discharge for non-membership. The National Labor Relations Board found that such discharge was unlawful under section 8(a)(3), and its order directing the reinstatement of the employee was affirmed by the Court of Appeals. It is thus difficult to see how it could be said that the tender by an employee of the union dues in such a case manifested a willingness to become or remain a member of the union, as contended by petitioner.

It is abundantly clear, therefore, that while section 8(a)(3) may permit an employer and a union to enter into an agreement containing a compulsory membership clause, it prohibits enforcement of the membership requirement. All it permits is the enforcement of an obligation to pay the equivalent dues and fees.

For practical purposes, then, compulsory membership as a condition of employment is outlawed by the National Labor Relations Act, and if, as petitioner contends, section 14(b) leaves to the states only the authority to prohibit compulsory membership in literal terms, Congress left nothing to the states other than the empty right to enact laws prohibiting that which is already prohibited under the federal law. Section 14(b) would thus have no real meaning, its inclusion in the Taft-Hartley Act would have been a meaningless gesture, and the extensive discussion of the purpose of section 14(b) in the legislative history, as referred to hereinabove, was a complete waste of Congress' time and energy.

It follows that for section 14(b) to have any meaning it can only be construed as preserving to the states the authority to regulate the same forms of union security agreements as are authorized or permitted under section 8(a)(3). This obvious conclusion was pointed out by the Supreme Court of Kansas in *Higgins v. Cardinal Manufacturing Co.*, supra, and by the United States District Court in *Amalgamated Association v. Las Vegas-Reno-Tonopah Stage Lines*, supra, See also *Sheet Metal Workers International Assn. v. Nichols*, supra, and *Meade Electric Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408 (1959), in which the question of state authority to regulate Agency Shop clauses was similarly raised.

The National Labor Relations Board and the Solicitor General of the United States have similarly taken the position that "section 14(b) was aimed at preserving for the states the same freedom which they had previously enjoyed to regulate all forms of compulsory support for labor organizations . . . Accordingly, section 14(b) has been held to authorize state prohibition of Agency Shop agreements." (See Brief for NLRB in the *General Motors* case, No. 404, now pending before this Court, p. 37). Any other construction would, as pointed out above, deprive section 14(b) of any meaningful substance and lead to an absurd conclusion.

III.

AGENCY SHOP AGREEMENTS ARE NOT EVEN "ARGUABLY" A PROTECTED ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT, AND ARE THUS NOT WITHIN THE EXCLUSIVE JURISDICTION RULE STATED IN SAN DIEGO BUILDING TRADES COUNCIL v. GARMON.

Petitioner contends that state authority to regulate Agency Shop agreements is incompatible with the decision of this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), wherein this Court stated:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield."

On the basis of this language in *Garmon*, petitioner urges that the Agency Shop agreement involved in this case, as well as the parties' conduct pursuant thereto, constitute protected activity within the scope of section 7 of the Act, and are thus subject to exclusive federal jurisdiction.

This contention, as will be seen, is based upon an improper reading of the *Garmon* decision. In the first place, that case did not involve the question of union security agreements or state right-to-work laws in any shape, man-

ner or form. It involved an action brought by a lumber company against a group of labor unions to recover damages arising from unlawful picketing of the company's premises. The company first filed an unfair labor practice with the National Labor Relations Board, charging that the union picketing violated section 8 of the National Labor Relations Act. The Board's general counsel refused to issue a complaint in this case, and the company was thereby blocked from any hope of getting relief through the Board. It then filed suit in a California state court alleging the identical conduct by the unions. The state court held that this conduct constituted tortious conduct under state law, and awarded damages to the company. The judgment was affirmed by the Supreme Court of California and a petition for certiorari was granted by this Court.

In reversing the decision of the California Court, this Court stated:

> "The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act. It is not for us to decide whether the National Labor Relations Board would have, or should have decided these questions in the same manner. When an activity is arguably subject to section 7 or section 8 of the Act, the states as well as the federal courts must yield to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (p. 245).

It can thus be seen that in *Garmon* the California courts were dealing with a specific type of picketing which is expressly described in section 8, and which may or may not constitute an unfair labor practice under section 8, depending upon the purpose for which it is carried on. The determination of its character as either an unfair labor practice or as a permissible type of picketing, this Court held, was a function which Congress entrusted to the National Labor Relations Board, and the failure or refusal of the Board's general counsel to issue a complaint did not, of itself, clothe the state courts with jurisdiction over such conduct. It was in this context that the Court used the phrase "arguably subject to section 7 or section 8", and to regard this language as creating an all-embracing and totally pervasive extension of federal jurisdiction to any and every action which in the most remote way could "arguably" be subject to the federal Act would lead to ridiculous results.

Nonetheless, petitioner contends that this language must, in this instance, be construed as striking down the right of the states to enforce restrictions on compulsory unionism, which, as hereinabove pointed out, Congress clearly intended to leave to the states. In spite of such Congressional intent, petitioner urges, the Agency Shop form of union security here involved is "arguably protected" under the federal Act, and thus beyond the reach of state jurisdiction. However, from the regulatory scheme of the National Labor Relations Act, it is clear that Agency Shop agreements, as well as other forms of compulsory unionism, are not even "arguably" protected forms of activity.

Beginning with the original Wagner Act, there was

no Congressional intent under that Act to either protect or prohibit union security agreements of any kind, and the states were free to apply their own laws in this field. *Algoma Plywood & Veneer Co., v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949). In *Algoma*, the Court pointed out that although section 8 (3) of the Wagner Act authorized compulsory unionism agreements, such authorization under federal law did not affect the power of the states to restrict them, because "Section 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union security agreements." It is thus clear that there was no intent under the Wagner Act to treat such agreements as a form of protected activity.

The Taft-Hartley Act amendments to the Wagner Act in 1947, continued the authorization for agreements requiring membership in a labor organization as a condition of employment, but narrowed its permissible limits so as to exclude closed shop agreements and, as pointed out heretofore, to prohibit the discharge of an employee for any reason other than payment of union dues and fees. There is nothing in the Taft-Hartley Act amendments or in the legislative history to show that by these changes Congress intended to federally "protect" any form of compulsory unionism agreement. Compulsory unionism agreements have been given no greater status under the amended Act than they had under the Wagner Act, and to the extent that any form of compulsory unionism is "permitted" under the amended Act it is only "permitted" and nothing more. The Act does not provide any guarantee or establish any other form of sanction for such agreements, and they are not, therefore, to be treated as a class of protected activity under federal law.

It remains to be decided whether Agency Shop agreements are a "prohibited" form of activity under section 8(a)(3) of the Act. This question is now before this Court in the *General Motors* case, and respondents herein take no position on this point. Respondents contend only that if Agency Shop agreements are not prohibited under section 8(a)(3), they are, as pointed out above, merely "permitted" rather than "protected".

Petitioner also contends, apparently, that even if the states have authority to adopt right-to-work laws restricting compulsory unionism, they lack the power to enforce such laws because any conduct which gives rise to a violation of a right-to-work statute is also a violation of section 8 of the National Labor Relations Act. In support of this contention petitioner cites *Local 438, Construction Laborers v. Curry*, 83 S. Ct. 31, decided Jan. 21, 1962; *DeVries v. Baumgartner Construction Co.*, 359 U.S. 498 (1959); and *Electrical Workers v. Farnsworth and Chambers Co.*, 353 U.S. 969 (1957). An analysis of these cases will show that they do not support the conclusion which petitioner attempts to draw from them.

In the *Curry* case cited by petitioner, the Supreme Court of Georgia ruled that peaceful picketing which had for its purpose the enforcement of payment of prevailing wages and exclusive hiring of union members was contrary to the compulsory unionism prohibition in the Georgia right-to-work statute, and the state court could properly enjoin the union picketing. In reversing the Georgia Supreme Court, this Court pointed out that the allegations of the complaint, as well as the findings of the Georgia court, involved conduct of a type expressly dealt with in section 8(b) of the National Labor Relations Act, and the

determination of whether such conduct was a violation of this section was within the exclusive competence of the National Labor Relations Board. Thus, there was present in the *Curry* case conduct which, quite apart from and independent of any compulsory unionism question under the state right-to-work law, was within the scope of section 8.

Farnsworth and Chambers, supra, similarly involved a state court injunction of union picketing on the grounds that one of the purposes of the picketing was to enforce exclusive employment of union members, in violation of the Tennessee right-to-work law. The injunction was stated in the broadest possible terms, and prohibited the union from seeking in any way to persuade or induce the complainant company's employees, either at their place of employment, in their homes, or anywhere else, to cease work or otherwise interrupt their employment. The union, in seeking review of the state court action by this Court, insisted that the picketing did not involve any union security question. In its petition for writ of certiorari the union stated:

> "The contention of petitioners below was that the original bill of complaint and the amended bill of complaint showed on their faces that the subject matter of the complaint . . . set forth statutory unfair labor practices as to which the Act confers exclusive primary jurisdiction on the National Labor Relations Board. Nor was there any question raised, nor does the Record support the discussion in the opinion of the Supreme Court of Tennessee dealing with union security agreements." (P. 9.)

Thus, the union contended, and this Court, by reversing per curiam, apparently agreed that the Tennessee Court had mistakenly construed the picketing as being for the purpose of enforcement of a compulsory unionism demand. *DeVries v. Baumgartner, Construction Co.*, supra, also cited by petitioner, involved a state court injunction against picketing in a situation substantially similar to that involved in *Farnsworth and Chambers*.

Each of these cases was instituted by a complaint filed by an **employer** complaining of union conduct which, completely independent of any union security issue, was on its face the type of conduct regulated by section 8 of the National Labor Relations Act. No such conduct was involved in the present case, however.

The Schermerhorn case before the Supreme Court of Florida involved no union picketing or strike, or any other course of action that could independently be said to be an unfair labor practice under section 8. It was an action brought by **employees** contending that their jobs were threatened by a compulsory unionism **agreement** between their employer and the union.

The Florida Supreme Court dealt only with the legal question of whether the Agency Shop agreement was permissible or prohibited under the right-to-work provision of the Florida Constitution. There was nothing here for the National Labor Relations Board to decide.

What petitioner is contending, in effect, is that although a state may enact a right-to-work law, it has no power to enforce such a law. Not only that, petitioner contends, a state court may not, as the Florida Court held,

interpret the meaning of its own law as applied to a particular form of compulsory unionism agreement. This contention, it can be seen, leads only to an absurd conclusion.

In this case, the Florida Supreme Court was not interpreting or administering the National Labor Relations Act. It was merely interpreting the scope of a state constitutional provision. It would be ridiculous to contend that we have reached the point where the National Labor Relations Board is the only body with jurisdiction to interpret or construe a provision of a state constitution insofar as that provision deals in any way with labor relations matters.

In *Willard v. Huffman*, 250 N.C. 396, 109 S.E.2d 233, cert.den., 361 U.S. 893 (1959), the Supreme Court of North Carolina upheld a judgment awarding damages to an employee discharged for non-membership in a union in violation of the North Carolina right-to-work law. The Court rejected the contention of the employer that the discharge constituted an unfair labor practice under section 8(a)(3) of the National Labor Relations Act, stating:

> "Our courts, in the case before us, are not seeking to administer the provisions of section 8(a)(1) and (3) of the Labor Relations Act, Title 29, USCA; they seek only to enforce the provisions of our own Right-to-Work Act, provisions which have no counterpart in the National Labor Relations Act . . . our Right-to-Work Act has been held to be constitutional by this Court and by the Supreme Court of the United States.

Whitaker v. State of North Carolina, (335 U.S. 525)."

A petition for certiorari to review the decision of the Supreme Court of North Carolina in this case, was denied. 361 U.S. 893 (1959).

IV.

PETITIONER'S SUBSTITUTION OF A NEW NAME FOR THE AGENCY SHOP DOES NOT DISTINGUISH THE AGENCY SHOP AGREEMENT HEREIN FROM THE AGENCY SHOP AGREEMENT IN THE GENERAL MOTORS CASE. THIS SUBSTITUTION OF NAMES MERELY RAISES A FALSE AND FICTITIOUS ISSUE.

Petitioner, in its brief before this Court, for the first time, has suddenly decided that the agreement here involved is not an Agency Shop agreement, but is something which petitioner now refers to as a "service fee agreement". On this purely semantic basis, petitioner seeks to distinguish this agreement from the Agency Shop agreement involved in the *General Motors* case, in an apparent effort to avoid the inconsistency involved in arguing that the word "membership" in section 14(b) does not include such agreements.

It is interesting to note that the particular clause in the contract between petitioner and Food Fair, is headed "Agency Shop Clause" (R-13), and that the notice to employees issued jointly by the union and Food Fair (R-7) refers throughout to the establishment of an Agency

Shop and the requirement of the employees to pay Agency Shop fees. In its pleadings in the trial court, in its arguments and briefs in the District Court of Appeal, throughout the proceedings in the Florida Supreme Court, and in its petition for writ of certiorari in this Court, petitioner consistently referred to the agreement as an "Agency Shop agreement" and never once described or named it as a "service fee agreement", as it now seeks to use this term.[6]

Furthermore, in its petition filed with this Court for a writ of certiorari to review the decision of the Florida Supreme Court, petitioner referred to the agreement only as an "Agency Shop agreement". At no time prior to the filing of its present brief, did petitioner refer to a so-called "service fee shop agreement", or otherwise attempt to draw the type of distinction which it now seeks to contrive.

One of the distinctions between this case and the *General Motors* case, according to petitioner, is that "the amount of the fees in *General Motors* is strictly tied to the union dues schedule", whereas the contract here involved "fixes the amount of fees to be paid at the level of actual collective bargaining costs." (Petitioner's brief, p. 57). Similarly, petitioner states, "the purpose of the fee and the uses to which the money may be put in *General Motors* are unrestricted, and the union in *General Motors* presumably is free to use fees so received for purposes other than meeting actual costs of collective bargaining." (ibid). The Schermerhorn contract, petitioner states, "limits the purpose for which fees may be collected from non-mem-

[6]For example, see petitioner's response to application for temporary injunction (R. 11, 12), and petitioner's petition for writ of certiorari (pp. 8, 9, 11, 13, 14, 16, 18, 19, 20, 21, 22).

bers solely to defraying the union's collective bargaining costs on behalf of non-members." (ibid).

Both of these contentions are clearly refuted by the facts in the Record. In the first place, the amount of the fees in both *General Motors* and the present case are strictly tied to the union dues schedule. The "Important Notice to Employees" (R. 7) issued jointly by petitioner and Food Fair, following the formal signing of the Agency Shop agreement, states:

> ". . . you are obligated, under the provisions of the Agency Shop, to pay an initial service fee which is the **equal** of the initiation fee for union members, and a monthly service fee which is the **equal** of the monthly dues for those who voluntarily become union members.". (R. 7). (Emphasis added).[7]

While the Schermerhorn Agency Shop Clause itself provides that the amount of the Agency Shop fees "shall in no case exceed the initiation fee and the membership dues paid by those who voluntarily choose to join the union", there is no provision for setting the fees at any lower level, and the notice to employees stating that the amount of the fees shall be *equal* to the union initiation fees and dues, clearly shows what the parties intended in this respect.

Petitioner's contention that the Schermerhorn con-

[7] In the *General Motors* formula the union demand was for payment by the non-union member of a sum *equal* to the initiation fee charged members at each of the union's locals, and monthly sums *equal* to the regular membership dues required of the union's or its locals' members at each location.

tract limits the purposes for which fees may be collected, is, again, a purely fictionalized version of the situation. There is no actual restraint imposed upon what the union does with the money once it receives it. The union suggests that an employee could, by way of a grievance procedure, challenge the use of the money for purposes other than collective bargaining, but the practicality of such a challenge is quite another matter. Quite conceivably, the union could earmark all of the money collected from non-union employees for defraying the costs of collective bargaining, and allocate all of the money received from union members for non-collective bargaining activities.[8] There are many other bookkeeping devices which could be used to maintain the fiction that the so-called service fees are allocated only to costs of collective bargaining. In any event, it is difficult to see how the union's accounting methods and procedures would be subject to any real degree of control. The union, after years of collecting dues, doesn't even know what its collective bargaining costs are. (See Footnote 27, petitioner's brief, p. 32.) Thus, for all practical purposes, there is no limit imposed on the purpose and use of the exacted dues and fees under this agreement.[9]

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[8]The AFL-CIO Committee on Political Education follows this method of regulating monies spent for "education" and those used for direct political contribution. See Annual Reports filed pursuant to the Federal Corrupt Practices Act with the Clerk of the House of Representatives.

[9]It is evident from the Annual Report filed by the Retail Clerks International Association with the United States Department of Labor, Bureau of Labor Management Reports and signed by the President of the International on July 16, 1962, that the dues, fees and moneys collected by the Retail Clerks International are used for a broad range of purposes not related to collective bargaining. The Report shows that for the reporting period commencing May 1, 1961, and ending April 30, 1962, the total assets were $5,409,831. and that the total liabilities

The brief filed for the AFL-CIO and the United Auto Workers as Amici Curiae, similarly seeks to distinguish the agreement involved in this case from the Agency Shop agreement involved in *General Motors*. This brief states:

> "Nevertheless, we recognize that the "agency shop" formula presented in the *General Motors* case remains arguably subject to state prohibition on the theory that it does *in fact* require membership . . . since the periodic payments are but an equivalent substitute for union dues and are used for union benefits denied to non-members, the payment for unobtained benefits encourages membership and is tantamount to the compulsion of membership." (pp. 36, 37).

It thus appears that the AFL-CIO and the United Auto Workers concede that Agency Shop contracts are subject to state regulation under section 14(b), but in order to avoid that result in this case, they have invented a new name for this agreement, which they now call "the service fee shop" instead of an Agency Shop, as they had been calling it all the time up to now. They thus hope, merely by substituting a new name, to cloud the issues and mislead the Court.

To permit the petitioner to change its position in this manner, after having convinced this Court to accept jurisdiction on the issue of an Agency Shop, makes a mockery

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were $221,276. with the Retail Clerks International thus having net assets of $5,188,555. The Report shows very large sums of money spent by this union for contributions and gifts, educational and publicity expenses, television shows, benefits and charities. The President of the union signing the Financial Report received a gross salary and allowances of $58,294.52.

of the processes of this Court. Respondents remind the Court that the question presented in petitioner's petition for writ of certiorari to the Florida Supreme Court, set forth on page 2 thereof, was as follows:

"QUESTION PRESENTED"

"WHETHER THE FLORIDA SUPREME COURT MISCONSTRUED SECTION 14(b) OF THE TAFT-HARTLEY ACT IN HOLDING THAT IT AUTHORIZES THE STATES BOTH TO PROHIBIT AND TO REGULATE AN 'AGENCY SHOP' CLAUSE IN AN INTERSTATE LABOR CONTRACT, WHICH CLAUSE DOES NOT REQUIRE 'MEMBERSHIP' IN A LABOR UNION, BUT WHICH DOES REQUIRE NON-MEMBER EMPLOYEES TO PAY A COLLECTIVE BARGAINING SERVICE FEE TO A LABOR UNION."

If unions are able to thus change the names of compulsory exaction devices at will, or in the middle of the legal stream, there is no limit to the fanciful names that can be coined.[10] As another example, the United Auto Workers Union has set up compulsory exaction devices

[10]The Agency Shop device obligating employees who don't join the union to pay the equivalent of dues for the union services was the subject of an unofficial report prepared by one Glenn C. Fleshman, Commissioner of the Federal Mediation and Conciliation Service on April 20, 1959, such report being referred to at page 12 of the brief of the AFL-CIO as a report of the Federal Mediation and Conciliation Service. The author illustrated that the Agency Shop clause has been referred to under many names, including "Dues and Services for Deduction", "Dues or Charity", "Service Clause", "Charity and Services Clause", "Welfare Fund and Conscientious Objections", "Service Charge", "Work Permits", "Equivalent of Dues", "Equal to Dues", "Service Costs", and "Union Shop or Equal to Dues and Assessments".

under the name of "Flower Funds", which presumably are for the purpose of buying flowers for deceased brethren, but in practice are private slush funds for Union officials to use for political contributions and other purposes. See Hearings, Senate Committee on Improper Activities in the Labor Management Field, 1959—Part 58, pp. 20118-20127; 20294, 20295. To paraphrase the Immortal Bard, "A Flower Fund by any other name smells just as odorous."

Having conceded that Agency Shop agreements are probably subject to state regulation under section 14(b), petitioner and its parent AFL-CIO now propose that "a true service fee" for services actually rendered to an employee by a union "is not even a form of union security as commonly understood", and is thus completely outside the scope and contemplation of section 8(a)(3) as well as section 14(b). (Petitioner's brief p. 58; AFL-CIO, UAW brief, pp. 37, 41). It is a non-discriminatory arrangement, petitioner contends, for the purpose of prorating costs, and is not subject to section 8 at all.

This contention completely ignores the fact that such an arrangement, whatever economic arguments can be advanced for it, still conditions an employee's employment upon support of a labor union. If he doesn't pay the money to the union he will lose his job. It is thus a form of compulsory unionism. The petitioner's contention also overlooks the fact that section 7 of the National Labor Relations Act guarantees the right of employees not only to join, form and assist labor organizations, but also to refrain from joining, forming or assisting labor organizations. It must certainly be admitted that the discharge of an employee for failure to pay money for the purpose

of assisting a labor union to defray its costs, whatever these costs might be, would deny him this fundamental right protected by section 7, to refrain from assisting a labor union. The Record shows that the plaintiff-respondents do not want "to pay the defendant union any dues or service fees or initiation fees" (R. 5), and to compel them to pay any such moneys to the union as the price of keeping their jobs would be a form of compulsory support of a labor organization, regardless of the effort to disguise the payment as a so-called service fee. As petitioner so aptly expresses it in its brief in support of petition for a writ of certiorari, "In labor relations, as in all other aspects of political life, the power of the purse strings is the power to control". (Petition for writ of certiorari, p. 21). Thus, the union by seeking the power to exact a service fee is seeking the power to control the worker's job by conditioning his employment on payment of a compulsory fee. If this is not compulsory unionism, what is it?

The Solicitor General in his brief in *General Motors* (p. 12) similarly suggests that "a service fee to defray the costs of a hiring hall, of processing grievances, or of performing other functions directly beneficial to all employees in the bargaining unit—might well be outside the area of 'union security' altogether . . . quite independently of the proviso to section 8(a)(3)." This suggestion is directly contradictory to the argument made on page 8 of the same brief, wherein it is stated:

> "The proviso's reference to 'an agreement with a labor organization . . . to require as a condition of employment membership therein' covers not merely agreements requiring membership of all employees in *haec verba*, but all contracts calling

for any lesser kind of compulsory association with, **or support for a labor organization** which, but for the proviso, would violate the policy of the Act." (Emphasis added).

Thus, on the one hand it is urged that the term "membership" embraces "**all** contracts calling for support of a labor organization", and on the other, it is suggested that the same term—"membership"—does not embrace **some** contracts calling for support of a labor organization." The contradiction within and inconsistency of such a position is much too glaring to require any further comment.

It must be emphasized that in enacting section 14(b) Congress did not distinguish between full payment of union dues, partial payment of union dues, payment of service fees, or any other type of compulsory payment; it repeatedly and consistently referred to "all forms of compulsory unionism". Section 14(b) is a clear expression of Congressional intent that the Act is not to be interpreted in such a way as to circumvent state laws prohibiting or regulating compulsory unionism.

An even more significant point, which seems to have been overlooked by petitioner as well as by the AFL-CIO and the Solicitor General, is that if, as they contend, service fee payments "might well be outside the area of 'union security' altogether" and thus beyond the scope of section 8 of the Act, there is no ground for applying the doctrine of federal preemption at all. Any arrangement or course of conduct which is unregulated by federal law is left for regulation by the states. This principle was recognized and reiterated in *Garmon*, as well as in

International Association of Machinists v. Gonzales, 356 U.S. 617 (1957); *U.A.W. v. Russell*, 356 U.S. 634 (1957); *Construction Workers v. Laburnum*, 347 U.S. 656 (1954), and *United Auto Workers v. Wisconsin*, 351 U.S. 266 (1955).

The complete inconsistency of petitioner's position in this respect can be seen from the fact that in one section of its brief (p. 19), it insists that the contract here in question is "arguably" subject to regulation under section 8(a)(3) and, accordingly, "respondents could have filed section 8(a)(3) unfair labor practice charges against petitioners with the National Labor Relations Board", and in another section of its brief (p. 58), it argues that the Schermerhorn contract is "completely outside the scope and contemplation of section 8(a)(3)". If this latter contention is correct, it is obvious that the agreement is not "arguably" subject to regulation under section 8(a)(3), and since, for reasons heretofore shown, it is not "protected" under section 7, it must then be regarded as entirely beyond the regulatory scheme of the National Act, and left for regulation by the states.

Another section of the Taft-Hartley Act, section 302(c)(4), imposes a further obstacle to petitioner's contention that service fees are beyond the scope of the Act, and may be exacted from employees as a condition of employment. Under this section, an employer may not deduct from the wages of employees and pay over to a union any money other than "money deducted from the wages of employees in payment of membership dues in a labor organization". (Emphasis added). The check-off of any moneys other than amounts representing membership dues, it has been held, is prohibited by this section.

Carroll v. American Federation of Musicians, 295 F.2d 484 CA 3 (1961); *International Union, Mine, Mill and Smelter Workers v. American Zinc, Lead and Smelting Co.*, decided Jan. 2, 1963, U. S. Court of Appeals for the Ninth Circuit. In the *Carroll* case, the Court of Appeals held that only assessments which are "incidents of membership" are permitted to be paid under section 302(c)(4). Similarly, the Department of Justice, the agency charged with enforcement of section 302, has held that certain assessments imposed under a United Mine Workers agreement were "incidents of membership", and could lawfully be deducted. See *NLRB v. Food Fair Stores*, 307 F.2d 3, CA 3 (1962).

It can hardly be argued that service fees collected from non-members of a union are "incidents of membership" for the purposes of this section.

It should also be noted that the National Labor Relations Board has held that various forms of assessments voted by a union are not within the term "periodic dues" as used in section 8(a)(3), and that an employee employed under a union shop contract may not be discharged for refusal to pay such assessments. See *International Harvester Co.*, 95 NLRB 730; *Continental Can Co.*, 98 NLRB 1252; *Anaconda Copper Co.*, 110 NLRB 1925. The Board has also held that a union which charges fees for services rendered non-members thereby prejudices its status as the bargaining agent. *Hughes Tool Co.*, 104 NLRB 318. In that case, the Board indicated it would revoke the certification of a union if it did not abandon its claimed right to charge a service fee of $15 for handling grievances of non-union members, and other service fees of varying amounts. Thus petitioner herein, in asserting its claim

to "service fees" may not be aware of this threat to its right to continue as bargaining agent.

V.

PETITIONER'S PLEA THAT NON-UNION WORKERS SHOULD BE COMPELLED TO FINANCIALLY SUPPORT THE UNION OVERLOOKS AND IGNORES THE INDIVIDUAL'S FUNDAMENTAL RIGHT TO WORK. THE RIGHT TO WORK SHOULD NOT DEPEND ON ONE'S CRAFT, RACE, COLOR, LODGE, CHURCH OR OTHER ORGANIZATIONS TO WHICH HE BELONGS.

The right to work is one of the most precious liberties that man possesses. Man has as much right to work without compulsion as he has to live, to be free, to own property, to speak his mind, or to join a church of his own choice, for without freedom to work, the other freedoms would soon disappear.

Petitioner, in contending that it should suffer no loss for "having conferred a direct benefit" on the respondents, has overlooked and ignored fundamental right-to-work liberty and is trying to take unto itself, the compulsory taxing powers of sovereign government. The power to tax, however, is reserved to the government and has not been delegated to the union.[11] Petitioner, as well,

[11]Interestingly enough, the petitioner and other labor organizations receiving direct benefits from the federal and state governments are exempt from the payment of income taxes (I. R. C. (1954), Sec. 501(c)(5); I. R. C. (1959) Sec. 101( ) and Florida real property taxes (Florida Statutes (1961) Sec. 192.06 (10). The respondents, not being tax exempt labor organizations, pay income tax and Florida property tax.

ignores the fundamental objective of the National Labor Relations Act which Act was passed for the primary benefit of the individual and not for the financial benefit of the unions.

The union's plea that fairness requires financial support of the union by non-union employees under a service fee arrangement, should be addressed to Congress or to the state legislatures, rather than to this Court. As stated by Justice Frankfurter in *A. F. of L. v. American Sash Co.*, 335 U.S. 538, 553 (1949):

> "If the proponents of union security agreements have confidence in the arguments addressed to the Court in their 'economic brief' they should address those arguments to the electorate. Its endorsement would be a vindication that the mandate of this Court could never give."

The American Sash Co., case, together with the companion cases, *Lincoln Federal Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525, and *Whitaker v. North Carolina*, 335 U.S. 531, decided at the same time, held that no violation of the due process clause is involved in state prohibition of compulsory unionism. In spite of this clear holding, petitioner in its brief, (p. 35) contends that the "union's required expenditures for non-members, if not recoverable through a reasonable service fee, might raise a question of deprivation of property without due process". Petitioner is thus attempting to interject into this case an issue not raised in the court below, and one which has already been authoritatively answered and rejected by this Court.

More fundamental than the claim of this wealthy, tax-exempt union for a broader distribution of collective bargaining costs is the inherent right of the respondents, and all persons, to work for a living without fear of coercion. The right to work is an individual liberty of the highest order, and one that should not be subordinated to the economic claims of any organization, whether it be a labor union, lodge, church, political party or any other group.

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the . . . Constitution . . . to secure." *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

The right to work principle has been most eloquently expressed by the venerable Mr. Justice Terrell of the Florida Supreme Court in *Carpenters Dist. Council v. Miami Chapter, Associated General Contractors*, 55 So.2d 794, 796 (1952) as follows:

> "The right to work is equivalent to the right to eat and the right to eat and provide raiment for his dependents is man's most dominant urge. In a free country like ours such a right should not depend on one's race, color, the lodge, craft, church or other organizations to which he belongs. Such a requirement is contrary to the spirit of our institutions, the basis on which our democracy was founded and every impulse of the forefathers who gave it existence. I can think of nothing more out of harmony with true Americanism. Membership in one's lodge, craft or

church may be a means of enlarging spiritual, cultural and physical assets, but to make his bread depend on craft, or church membership would be the worst species of anti-americanism."

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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